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Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-241

KABLE PRINTING COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

and

LOCAL 91-P, GRAPHIC ARTS INTERNATIONAL UNION, AFL-CIO,

Respondents.

BRIEF OF RESPONDENT LOCAL 91-P, GRAPHIC ARTS INTERNATIONAL UNION, AFL-CIO, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EUGENE COTTON,
RICHARD F. WATT,
THOMAS D. ALLISON,
Attorneys for Respondent Local 91-P, Graphic Arts International Union, AFL-CIO

Of Counsel:

COTTON, WATT, JONES, KING & BOWLUS
Suite 4750, One IBM Plaza
Chicago, Illinois 60611
(312) 467-0590

CHAS. P. YOUNG-CHICAGO

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Respondent Local 91-P, Graphic Arts International Union, AFL-CIO, urges the Court to deny the petition for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Seventh Circuit. Contrary to Petitioner's claims, the decisions below follow the prior decisions of this Court, create no conflict among the circuits, and are wholly consistent with Board precedent.

Statement of the Case

Because Petitioner's statement of the case fails to set out all of the facts pertaining to Petitioner's arguments, and specifically fails to disclose Petitioner's continuing abuse of National Labor Relations Board procedures, Respondent believes that a full statement of the case is appropriate.

The Parties

Petitioner Kable Printing Company (hereinafter "Kable" or "the Company") is a publication printer, with facilities in Mt. Morris, Illinois. Kable uses the traditional rotogravure printing process, which contains the following integrated production steps:

1. Artwork is prepared for camera and photographed, and special films are produced to transfer the photographic image to large copper-plated cylinders.

2. The images on the film are transferred onto the cylinders, and proof sheets are prepared.

3. The proof sheets are corrected for such technical qualities as density, color quality and register.

4. The engraved cylinders are corrected by various methods, including re-etching, further chemical etching, hand-tooling, lacquering, and dallicking. The cylinders are reprinted, reproofed and recorrected until finally approved, when they are plated with a durable chrome surface and moved to the pressroom.

5. In the pressroom, the cylinders are placed in the presses and the actual printing takes place.

6. During the printing process, the cylinders are routinely returned to the gravure area for correction and new plating and chroming to maintain the printing surface.

7. The printed materials are taken to the bindery for further bindery work and shipment.

8. The used cylinders are stripped of copper and chrome, the cylinder bases are repaired, and the bases are replated with new copper and ground to an exact dimension for future use.

Respondent Local 91-P, Graphic Arts International Union, AFL-CIO (hereinafter "Local 91-P" or "the Union"), has for many years represented the Kable employees responsible for the preparatory portions of this integrated process, which includes the film work, cylinder engraving, cylinder correction, proof mark-up, chroming, polishing, de-chroming, stripping, plating, grinding, and cylinder maintenance and movement. In terms of the foregoing summary, Local 91-P is the exclusive statutory representative for all Company employees engaged in steps 1, 2, 3, 4, 6 and 8 of the production process.

The Announcement of "Termination"

On May 10, 1974 the employees represented by Local 91-P went on strike, effectively shutting down the rotogravure preparatory portions of the Company's operations. In July, 1974, the Company suddenly announced that it had "terminated" the struck portions of its operations, while continuing all other aspects of its integrated printing process. Based solely on this representation of purported "termination" of operations already effectively shut down by the strike, Kable began an illegal refusal to bargain with Local 91-P which has continued through the Court of Appeals' recent enforcement of the Board's bargaining order, notwithstanding Local 91-P's consistent demand for bargaining to end the strike.

In decisions which arose in various contexts over the next five years, the United States Court of Appeals for the Seventh District, the United States District Court, and the National Labor Relations Board consistently found, based on separate evidentiary records in each case, *that Kable's sworn representations that it had "permanently terminated" all struck bargaining unit operations were false.* In case after

case, the evidentiary records were found to confirm that Kable has in fact at all times continued to perform the operations which it claimed to Local 91-P had been permanently terminated, that Kable had never in fact terminated these operations, and that Kable had never even intended to terminate these operations.[1]

The Petition to Decertify the Union

In the midst of this continuing charade of "termination," Kable petitioned the NLRB to decertify Local 91-P as bargaining agent of its rotogravure processing employees. Lengthy hearings on the Company's petition were held, and substantial briefs were filed with the Board in January, 1977. The *sole* issue at hearing was the voting eligibility of the striking Kable employees. Kable's claim that its own

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[1] Evidentiary determinations concerning this labor dispute, including findings on the facts related to the Company's false representations of "termination," were made in the following cases, among others:

Mt. Morris Graphic Arts International Union, Local No. 91-P (Blackhawk Engraving Co.), 219 NLRB No. 169 (1975), *affirmed*, 540 F.2d 1296 (7th Cir. 1976).

Graphic Arts International Union, Local 277, and Graphic Arts International Union (S & M Rotogravure Service, Inc.), 219 NLRB No. 171 (1975), *affirmed*, 540 F.2d 1304 (7th Cir. 1976).

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Zipp v. *Graphic Arts International Union, et al.*, Case No. 76 C 2009 (N.D.Ill., Western Div.)(J. Flaum).

unreplaced striking employees should not be allowed to vote was based *exclusively* on its continued representations of "permanent termination" of bargaining unit operations. To support this claim, Kable's witnesses swore that Kable had disposed of all of its engraving equipment and would never again engrave another cylinder. The Union submitted substantial evidence concerning the context of the announcement of "termination," the continued performance of unit work following "termination," the continued solicitation of and entry into contracts to perform "terminated" work for customers, the impossibility of terminating discrete portions of the closely integrated rotogravure process, the transfer and hire of new employees into the "terminated" unit, the covert return of Kable equipment sworn to have been "permanently disposed of," the limited duration of the Company's subcontracts for struck work from its suppliers, and other evidence supporting the conclusion that the announcement of "termination" was simply a sham to enable Kable to evade its statutory bargaining obligations.

While the case was awaiting decision by the NLRB, internal corporate documents were subpoenaed in another proceeding which showed conclusively that Kable's claims of "permanent termination" were knowingly false and a deliberate fraud on the Board. These documents showed that *at the same time* Kable witnesses had been swearing under oath that Kable would never again engrave another cylinder, *these same witnesses were actively engaged in purchasing a million dollars worth of new cylinder engraving equipment for installation in the Kable plant.*

Indeed, Kable continued deliberately to conceal the existence of this equipment even after it had been purchased. Hoping to have the Union decertified by the Board before the equipment's existence became known, Kable continued to claim that all gravure production operations had been "permanently terminated." The fact of the fraud only became known when the equipment was being physically installed in the Kable plant. The Union then learned of this

expansion of "terminated" operations, obtained the underlying Company documents, and promptly moved to introduce the evidence of this new equipment, obviously relevant to the Company's long-standing claims of "termination of operations."

Kable's response to this exposure of its own duplicity was shameless. For over three years the Company had absolutely refused to bargain with Local 91-P on the ground that it would *never* again perform bargaining unit operations. Kable's representatives falsely testified to this, even as they were purchasing a million dollars worth of new equipment to engrave the cylinders they claimed would never again be produced. When the Union unearthed internal corporate documents of Kable's real intent, which the Company had deliberately concealed, Kable adopted a position totally at odds with its prior sworn representations to the Board and the Courts: *it blithely claimed its employee's votes should not be counted because their jobs would be automated by the very equipment whose purchase had been falsely denied and improperly concealed.* Kable would have everyone simply overlook the incontrovertible evidence of its own improper conduct and the bitter strike and protracted legal proceeding which resulted directly from the Company's continued false representations.

The Board's Decision

The Board's actual ruling, which the Company still contests, was simple: the unreplaced striking employees were eligible to vote in the NLRB election to determine their statutory bargaining representative. The decision was wholly supported by the record evidence before the Board, was solidly based on fundamental legal principles concerning the voting rights of unreplaced strikes,[2] and was consistent with the findings of facts and law made by the Board and Court of

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[2] See, e.g., *N.L.R.B. v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967); *N.L.R.B. v. Laidlaw Corp.*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970); *Gulf States Paper Corp.*, 219 NLRB 806 (1975); and *Globe Molded Plastics Co., Inc.*, 200 NLRB 377 (1972).

Appeals in their earlier decisions in this dispute. The Board found, as it had in the earlier cases, that the Company had not in fact terminated its rotogravure preparatory operations and had never intended to terminate them.

With respect to the Company's eleventh-hour claim that its striking employees had been disenfranchised by the equipment whose existence the Company had taken such pains to conceal, the Board ruled that, after five years of knowingly false Company representations to the Union, the Board and the courts, it was "inequitable and unjust to permit Kable to use the very evidence it witheld for so long to disenfranchise the striking employees, by asserting that its new cylinder-engraving system extinguishes any reasonable expectancy of future employment on the part of those employees."

Subsequent Developments

An election was conducted, which the Union won overwhelmingly. The Company continued its refusal to bargain, and an order directing the resumption of bargaining was made by the Board upon summary judgment. The United States Court of Appeals for the Seventh Circuit unanimously enforced the Board's bargaining order, and the Company's petition for rehearing was denied.

THE PETITION SHOULD BE DENIED

I. The Court of Appeals Followed The Decisions of This Court

The Company's first argument is the last refuge of most Labor Board respondents: the Company argues that the Court of Appeals' decision conflicts with the requirement of *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474 (1951), that reviewing courts must consider all of the record evidence before the Board, including that which detracts from the Board's decision. Specifically, the Company claims

that the Court of Appeals failed to consider all of the inferences which the Company claims could be drawn from the evidence of resumed cylinder manufacture which the Company itself had deliberately concealed from the Board.

Putting aside the issue of the Company's equitable right to rely on evidence which it had deliberately and wrongfully concealed, its claim is simply wrong as a matter of fact. In its unanimous decision enforcing the Board's bargaining order, the Seventh Circuit went out of its way to emphasize that it had in fact reviewed *all* of the evidence before the Board, and specifically had reviewed the evidence which the Company claims was overlooked. Upon reviewing this evidence, the unanimous Court of Appeals panel stated (A3):

> [T]he evidence in question was not, when viewed in conjunction with the other evidence presented, of such significance as to reasonably increase the likelihood that a different result would have been reached.

The Court of Appeals' analysis was scrupulously consistent with the principles of *Universal Camera*.[3]

II. There Is No Conflict Among the Circuits

The Company's claim of a conflict among the circuits is artificially manufactured by comparing standards for review of Board election procedures with standards for review of

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[3] In its Brief, the Company also implies that the Board's rejection of the Company's eleventh-hour argument of disenfranchisement by automation violated these *Universal Camera* principles. In the first place, *Universal Camera* establishes a standard for review by the Court of Appeals, and not a standard for the Board. Secondly, the Board's refusal to allow the Company to continue its deliberate abuse of Board processes after three years of knowingly false testimony and concealed documents was absolutely proper. The Board did not refuse to admit or consider any evidence. It simply, and properly, refused to allow the Company to continue to profit from its three-year refusal to bargain based upon false representations by propounding post-hearing arguments for disenfranchisement based upon the very documents which it had deliberately concealed. See Moore, *Federal Practice*, ¶0.405[8], pp. 765-773.

factual findings in unfair labor practice cases. With respect to review of election procedures, this Court has always recognized that "Congress has granted the Board a wide discretion to ensure the fair and free choice of bargaining representatives." *N.L.R.B.* v. *Wyman-Gordon Co.*, 394 U.S. 759, 767 (1969). See also, e.g., *N.L.R.B.* v. *A.J. Tower Co.*, 329 U.S. 324, 330 (1946); *N.L.R.B.* v. *Waterman S.S. Co.*, 309 U.S. 206, 226 (1940). At the same time, this Court has held that in reviewing unfair labor practice determinations under Section 10(e) of the Act, 29 U.S.C. §160(e), the Board's decision must be supported by substantial evidence in the record taken as a whole. See, e.g., *Universal Camera Corp.* v. *N.L.R.B., supra.*

Using the identical standard of review which the Company claimed was appropriate in its briefs,[4] the Court of Appeals reviewed the Board's factual findings under the substantial evidence standard (A3-A4):

> Kable secondarily contends that the Board's factual findings regarding the strikers' eligibility to vote in the representation election at issue were not supported by substantial evidence. We find this argument, however, also to be without merit...From the materials submitted by the parties, it is clear that the Board had ample evidence before it to allow for the conclusion that the ties of the Kable strikers to the petitioner's working employees remained significant at the time of the election in question.

Not only is there no conflict, but the Court of Appeals applied the substantial evidence standard which the Company claims is appropriate.

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[4] See, e.g., p. 16 of Kable's Brief to the United States Court of Appeals: "The Board is given considerable discretion in determining who shall be eligible to vote in such elections, but it may not make this determination arbitrarily or unreasonably... Findings of fact relied upon by the Board in making such determinations must, of course, be supported by substantial evidence."

III. The Decisions Below Are Wholly Consistent With Prior Board and Court Decisions

Finally, throughout its petition the Company states, as if it were uncontested fact, that the striking employees' "expectancy of return" was eliminated by the Company's purchase of new cylinder engraving equipment. Thus, the Company claims that the Court of Appeals' decision conflicts with this Court's decision in *Allied Chemical and Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), is contrary to Seventh Circuit decisions in *Choc-Ola Bottlers, Inc.* v. *N.L.R.B.*, 478 F.2d 461 (1973), and *Duncan Foundry & Machine Works, Inc.* v. *N.L.R.B.*, 458 F.2d 933 (7th Cir. 1972), and is inconsistent with previous Board decisions.

The factual predicate for the Company's claim—the purported elimination of unit jobs by automation—was never made at hearing, is not supported by the record evidence, was specifically rejected by the Board and the Court of Appeals, and is essentially made up out of whole cloth. In fact, the record before the Board shows a clear expectancy of return for the unreplaced strikers. As set forth in detail in the Union's briefs to the Board and the Court of Appeals, the record evidence shows that the manufacture of cylinders with the newly purchased equipment will require at least 54 bargaining unit employees. The Board opened the ballots of 51 employees: 45 unreplaced strikers and 6 post-strike hires. The tally of these 51 ballots was 46-5 in favor of the Union. Obviously, each of these 51 employees has a clear expectancy of return. The Company's assumptions to the contrary were properly rejected by the Board and the Court of Appeals, and are not supported by the record.

CONCLUSION

For the foregoing reasons, Respondent Local 91-P, Graphic Arts International Union, AFL-CIO, prays that the petition for a writ of certiorari be denied.

Respectfully submitted,

EUGENE COTTON,
RICHARD F. WATT,
THOMAS D. ALLISON,
Attorneys for Respondent Local 91-P, Graphic Arts International Union, AFL-CIO.

Of Counsel:

COTTON, WATT, JONES, KING & BOWLUS
Suite 4750, One IBM Plaza
Chicago, Illinois 60611
(312) 467-0590

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